86-873 (1)

Supreme Court, U.S.
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October Term 1986

In the

Supreme Court of the United States

Antonio Mazza, Petitoner

V.

United States of America,
Respondent

Petition For a writ of certiorari to the United States Court of Appeals for the First Circuit

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PETITION AND
RECORD APPENDIX

By,
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11 PP

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

I. Considering the First Circuits' finding of prejudicial error in the instant case, then mis-applying at least three seperate tests from seperate circuits concerning harmless error; and the split in the eleven other circuits concerning harmless error analysis; What is the uniform test for prejudicial-violations of the Federal Rules of Evidence ?

II. Do § 2111 and rule 52(a) require harmless-error inquirey for all procedural errors or for all prejudicial violations of the Federal Rules of Evidence ?

III. Considering that the First Circuit found that the errors here were not merely technical; is the correct uniform standard of review a modified CHAPMAN test or does KOTTEAKOS govern the appellate review of prejudicial errors concerning the Federal Rules of Evidence ?

IV. Considering the First Circuits' finding on the prejudicial effect of five days of repeated hearsay by Government agents,and the First Circuits' stripping the error away from the whole; Does KOTTEAKOS require summary reversal and remand for reconsideration to the First Circuit Court of Appeals? ****

****With a suggestion to adopt the concurring opinion of Justices BRENNAN,BLACKMAN STEVENS and MARSHALL, in UNITED STATES V. LANE, 106 S.Ct 725, at 735-748 (1986)

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In the

Supreme Court of the United States

Antonio Mazza, Petitoner

V.

United States of America,
Respondent

Petition For a writ of certiorari to the United States Court of Appeals for the First Circuit

The Petitioner, Antonio Mazza pro se, Petitions this Court for a Writ of Certiorari.

JURISDICTION

The Judgment entered by the First Circuit is reported at 792 F2d 1210 (Appendix-A). A timely petition for rehearing was

was filed, and rehearing and rehearing En Banc were denied July 24,1986. Jurisdiction is invoked pursuant to 28 USC § 1254(1)

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall...be deprived of life, liberty, or property without due process of law;"

The Sixth Amendment to the united States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right.... to be confronted with the witnesses against him;..."

The Fourteenth Amendment to the United States Constitution provides in part:

> "...nor shall any state deprive any person of life, liberty, or property, without due process of law;nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVIIONS

28 U.S.C. § 2111:

> "On the hearing of any appeal or writ of certiorari in any case,the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Federal Rule of Criminal Procedure 52(a):

> "HARMLESS ERROR. Any error,defect irregularity or variance which does not affect substantial rights shall be disregarded."

Federal Rule of Criminal Procedure 52(b):

> "PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Also 28 U.S.C. Rules 404(b) and 801(c)

28 U.S.C. Rule 403:

"EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE,CONFUSION, OR WASTE OF TIME.

Although relevant,evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

STATEMENT

The decision is attached hereto and generally represents a majority of the governments facts in the case. The essence of the case began with a long term, high level, drug dealer Armand Barrasso, being seized in his home on August 3,1984 (Tr.T. Vol. 1 pp. 19-21), by the D.E.A.

Mr. Barrasso was found possessing Five Hundred and Ninety Five Grams of a contr-oled substance (cocaine)(Tr.T. Vol. 1,pp. 21) three guns (9 mm.; .25 Barretta and a pellet gun) ; $9,180.00 and assorted spoons, knives,drug cutting/packaging mat-erial(Tr.T. Vol.1.pp. 19-21;Vol.2.pp.22)

Barrasso was not arrested by the D.E. A. agents n. 1/

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n. 1 / In relation to this case(and other Florida cases) on or about Oct.22, 1984 Armand Barrasso plead guilty to a single violation of 21 USC § 841(a)(1). The true extent of his rewards or induc-ements was never revealed at trial,other than a government promise to inform his sentencing judge of his cooperation.

The agent was enlisted by the agents within one hour to pose as a seller of cocaine (on behalf of the D.E.A.)(Tr.T. Vol. 1. pp. 23) and to pass out samples on behalf of the D.E.A. (and their product)

The initial hearsay (which was covered in the first 66 pages of transcript yet unnecessarily repeated for the next 600 pages) statements were introduced through two government agents along with third party hearsay attributed to the defendant Mazza. A majority of these statements were never corroborated.

Neither the agents or Barrasso could be effectively confronted or crossexamined by counsel.(Tr.T. Vol. 1 through 8). Barrasso was given up to one ounce (Tr.T. Vol. 1 pp. 49-50) of cocaine to pass out as a sample, at a time, until a large enough sale could be arranged. The governments plan was to arrest the buyers of their product (Tr.T. Vol.1.pp 65-66).

A sample quote (Tr.T. Vol. 1. pp)

from Agent Vinton; through Asst. Attorney

General Voorhees, was:

Q. "What was the discussion between yourself and agent Doherty ?

A. "Mr. Doherty told me he had just got off the telephone with Barrasso who stated to him --

Mr. Farreese: Objection Your Honor.
The Court: Overruled on the same basis.
Mr. O'Donovan: Objection, Your Honor Please.
The Court: This information is not offered for the truth of the matter.Both Barrasso and Doherty, it's been represented to me, will testify;and the jury will have a chance to observe them on the witness stand.

THE WITNESS:That a man that was known to Mr. Barrasso by the name Tony Ramo had called him on the telephone and requested a meeting to discuss a cocaine transaction. So I told Mr. Doherty,who had now - - n. 2/

n. 2 / This hearsay was never corroborated. However, "Tony Ramo" was identified as def. Antonio Mazza. Mazza received a 12 year federal sentence consecutive to his State 1st degree life sentence .

The resulting waste of time created a grand total of 277 objections from the defense through the first 5 days of testimony. 23 of these objections were sustained.(Tr.)

The Asst. Attorney General restricted cross-examination during the same period having 47 of his 63 objections sustained by the trial Court.(Mazzone,J.) 9 cautionary instructions were required to be given and the majority of the trial was the persuit of the improper hearsay evidence from the government.Over half the trial consisted of the repeated double and triple hearsay.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The First Circuit Court of Appeals mentioned KOTTEAKOS in passing, but applied * Roger J. Traynor's viewpoint on harmless

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* / Former Chief Justice of the California State Supreme Court

error (quoted from GOVERNMENT OF VIRGIN ISLANDS V. TOTO, 529 F2d 278, at 284(3rd Circuit 1976),over MR. JUSTICE RUTLEDGE'S opinion in KOTTEAKOS V. UNITED STATES, 328 U.S. 750,761-765(1948)).

KOTTEAKOS, supra, specifically enunciated the appellate Court's function was not to "strip the erroneous action from the whole" or inquire "merely whether there was enough to support the result, apart from the phase affected by the error."id.

The First Circuit squarely disregarded this principle while never considering "what the error meant to them (the jury), not singled out and standing alone."id.

The entire opinion of the First Circuit is framed from the view of appellate Judges and appears to have forgotten that "the crucial thing is the impact of the thing done wrong on the minds of other men, not ones own, in the total setting."id.

In the instant case, five days of repeated double and triple hearsay(R.801(c))

(covering a span of more than 600 pages of trial transcript) was introduced intentionally by the government unnecessarily.

Although the government agents testimony bolstered their informants(Barrasso's) reliability and credibility, and other evidence existed "it is not the appellate Court's function to determine guilt ot innocence.(citation ommitted) Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate Judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance."KOTTEAKOS, supra id. at 763.

Specifically the First Circuit chose to strip the error from the whole by stating:

> "Having reviewed this evidence,we are satisfied that the admissible testimony overwhelmingly established the defendants' guilt, and we were therefore virtually certain that admission of the agents' improper testimony in respect to events 5,6, and 7 did not affect the jury's judgment."
>
> UNITED STATES V. MAZZA, 792 f2d 1210, 1221 (1st Cir.1986)

"Events 1,2,3, and 4 pose more serious questions. Nonetheless, we conclude it 'highly probable' that the testimony in question"did not affect the jury's judgment." GOVERNMENT OF VIRGIN ISLANDS V. TOTO, 529 F2d 278,284 (3rd Cir. 1976)(quoting R. Traynors, THE RIDDLE OF HARMLESS ERROR,35 (1970) " id.at 1221

Prior to "stripping" the error away from the case, the First Circuit stated:

"Indeed, the jury initially heard much of the story that we have presented in Part A,supra, through the government agents' description of what Barrasso told them out of court. This way of presenting evidence, the appellants' claim, led the jury to hear the governments' case three times -- twice out of the mouths of the government agents, in the form of inadmissible hearsay testimony, and only later in the form of admissible testimony by Barrasso himself. Barrasso they add, was a highly untrustworthy witness whose credibility was unfairly enhanced by the governments' manner of proof." n.3/ id. at 1215

The First Circuit decided:

"In our opinion, both reason and authority indicate the appellants are right about the inadmissibility of the challenged testimony of the government agents" id. at 1215

n. 3 / Because of other issues raised in MAZZA, supra at 1227, concerning Barrasso' being a co-conspirator; Please note the seperate hearsay violation in the governments order of proof. UNITED STATES V. AUSTIN,786 F2d 986, at 989,992(10th Cir. 1986)

The First Circuit based their opinion on their deciding that:

> "Because the "probative value" of the agents testimony was"substantially outweighed by the danger of unfair prejudice," it should have been excluded under rule 403 of the Federal Rules of Evidence." id at 1215

The First Circuit gave three reasons for their finding of "basic errors of Law":

> "First, the amount of out-of-court-statement evidence was large."id. at 1215

> "Second, when the out-of-court statements were admitted, the risk that they could improperly sway the jury was high. The testimony might have shown facts not later corroborated; it would also likely bolster the credibility of the informer Barrasso before he took the stand." id. at 1215

> "Third, the agents' testimony about Barrasso's out-of-court statements had almost no probative value."id. at 1216 (emphasis added)

Judge Breyer's First Circuit Opinion makes the best argument for granting the writ and requiring summary reversal.:

> "Barrasso's,later, admissible testimony offers only some , not total, corroboration, since the agents' testimony arguably preconditioned the jurors to overvalue Barrasso's credibility.----"

"We shall describe our results in detail, in part to show precisely how inadequate care in the conduct of a trial can convert an overwhelmingly strong prosecution case into a difficult issue on appeal." id. at 1217

"In respect to Mazza's entrapment defense the challenged testimony also was harmless. We do not believe it could have made a difference, given the remaining evidence of Mazza's actions, intent and predisposition." id. at 1221.

"In sum, the logical possibility, in the absence of the challenged testimony, the jury would have accepted DeCologero's story and concluded that it showed entrapment is no more than - a logical possibility." id. at 1222.

The Court then, after stripping the "erroneous action from the whole" stated that "we cannot, in good conscience , find the error other than harmless." id. at 1222.

It is well settled that a reviewing Court cannot make "overwhelming evidence" its' sole criteria for affirming a conviction. In the instant case, absent the initial hearsay of agent Vinton, later uncorroborated by co-conspirator/informant Barrasso's own testimony, the initial contact by Barrasso concerning the entr-

-apment defense, raised more than a reasonable doubt that Barrasso (not Mazza) made the initial contact. This contact was on behalf of the D.E.A., Barrasso acting as their sales representative (passing out samples on behalf of the D.E.A. and government).

There was sufficient evidence, but due to disputed issues, it was not overwhelming.

The First Circuit standard for the evaluation of prejudicial double and triple hearsay and violations of the Federal Rules of Evidence, is in direct conflict with this Courts' decision in KOTTEAKOS and the concurring opinion of Justices, BRENNAN, BLACKMAN, STEVENS, and MARSHALL, in UNITED STATES V. LANE,106 S.Ct. 725, at 735---748 (1986). A Sixth Amendment Violation also exists which requires an analysis under CHAPMAN V. CALIFORNIA, 386 U.S. 18(1967)

II. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS

The First Circuit Court of Appeals has decided a federal question in a way in conflict with the United States Court of Appeals for the Third and Fifth Circuits.

The First Circuit, in fact, used their view of "overwhelming evidence" as the sole criteria for affirming the conviction, under a purported KOTTEAKOS standard, and a partially over-ruled Third Circuit standard.

In, GOVERNMENT OF VIRGIN ISLANDS V. BEDFORD, 671 F2d 758, at 762 (3rd Cir. 1982), the Third Circuit expanded the harmless-error test to that set out by the Supreme Court in the holding in SCHNEBLE V. FLORIDA,405 U.S. 427,432(1972) cf UNITED STATES V. ZARINTASH, 736 F2d 66,72 (3rd Cir. 1984) ("unless there is a reasonable possibility that (the error) contributed to the conviction, reversal is not required."), when considering a

violation of the Federal Rules of Evidence. n. 4/ The Fifth Circuit in, UNITED STATES V. WEBSTER, 750 F2d 307, at 331 (1984) cert. denied 105 S.Ct. 2340-2341 (1985), stated that in the past (and the instant case) they applied both CHAPMAN V. CALIFORNIA, 386 U.S. 18(1967)(harmless beyond a reasonable doubt) and KOTTEAKOS standards when judging violations of the federal Rules of Evidence and erroneous hearsay rulings. n. 5/

This Courts' statement in CHAPMAN that "(t)here is little, if any, difference between our statement in FAHY V. STATE OF CONNECTICUT, (375 U.S. 85,86-87 (1963)) about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond

n. 4/ Also see: Third Circuit description of changing caselaw in McQUEENEY V. WILMINGTON TRUST CO., 779 F2d 916,924 n. 13 (1985)(SEITZ,BECKER, and ROSENN)

a reasonable doubt that the error complained of did not contribute to the verdict obtained." CHAPMAN, supra at 24, shows conclusively that the Third Circuits standard for a reviewing Court has been increased to that of "harmlessness beyond a reasonable doubt."

The Fifth Circuits open statement of applying both CHAPMAN and KOTTEAKOS when reviewing violations of the Federal Rules of Evidence and hearsay, is squarely in conflict with the decision of the First Circuit in Mazza and supports the granting of certiorari to consider the question of creating a uniform standard for judging prejudicial violations of the Federal Rules of Evidence.

This question is in the interest of uniformity between the Circuits in deciding important Federal Questions and to prevent further departure from the standards set by this Court.

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n. 5 / Compare UNITED STATES V. MARTINEZ, 588 F2d 495,499 (5th Cir 1979) with UNITED STATES V. PARRY, 649 F2d 292,296 (5th Cir. 1981)

III. THE NEED FOR A UNIFORM STANDARD OF HARMLESS ERROR REVIEW SUPPORTS THE GRANTING OF CERTIORARI

Presently there are many divergent, or mixed standards, (even within the same circuits' decisions) in the District of Columbia Circuit and the Eleven other Circuits. n. 6/

n, 6 / UNITED STATES V. TREADWELL,760 F2d 327,339 (D.C.Cir. 1985)(Kotteakos); UNITED STATES V. MAZZA,792 F2d 1210(1st Cir. 1986)(split Kotteakos-R.Traynor 3rd. Cir. TOTO,supra, standard or overwhelming evidence standard; hybrid);UNITED STATES V. HARRIS, 733 F2d 994,1005(2nd Cir 1984) (Kotteakos); UNITED STATES V. ZARINTASH, 736 F2d 66,72(3rd Cir. 1984)(hybrid Kotteakos-Schneble-Chapman);UNITED STATES, V. McCALL, 740 F2d 1331,1330(4th Cir 1984) (Chapman-Kotteakos);UNITED STATES V. CARVALHO, 742 F2d 146,151(4th Cir. 1984) (Kotteakos);UNITED STATES V. WEBSTER,750 F2d 307,331 (5th Cir. 1984)cert denied 105 S.Ct. 2340-2341(1985)(Chapman and/or Kotteakos and/or both);UNITED STATES V. ISMAIL,756 F2d 1253,1260 (6th Cir. 1985) (Kotteakos);UNITED STATES V. GREEN, 786 F2d 247,252 (7th Cir 1986)(Kotteakos) ; UNITED STATES V. GAULTIER, 727 F2d 711, 714-715 (8th Cir 1984)(Kotteakos):UNITED STATES V. PEYRO, 786 F2d 826,831 (8th Cir. 1986)(Jury verdict could have been affected by the (error) improper comment); UNITED STATES V. WEBBE, 755 F2d 1387,1389 (9th Cir 1985)(Kotteakos);UNITED STATES V. AUSTIN,786 F2d 986,992 (10th Cir. 1986)(Kotteakos);UNITED STATES V. WEINSTEIN, 762 f2d 1522,1535-1536(11th Cir. 1985)(Kotteakos-Chapman)mod. 778 F2d 673-674, U.S. App. Pndg.

This case presents an important question of Federal law concenring the applicable harmless error standard for prejudicial or substantive violations of the Federal Rules of Evidence and their related protections in the confrontation clause of the Sixth Amendment to the Constitution of the United States.

This question, which has not been ruled upon, but should be, supports the granting of certiorari and a decision of this Court.

IV. FUNDAMENTAL FAIRNESS SUPPORTS GRANTING CERTIORARI

Your petitioner understands that he is not entitled to a "perfect trial", LUTWAK V. UNITED STATES, 344 U.S. 604,614 (1953), but in light of the trial testimony of several government agents and their informant Barrasso, he would mildly suggest that he is entitled to a "fair one." MOONEY V. HOLOHAN, 294 U.S. 103,112

The governments introduction of a pending murder trial violated Rules 403 and 404(b) of the Federal Rules of Evidence. n. 7/

District Court Judge Mazzone's failure to answer the jury's request for reinstruction, BOLLENBACH V. UNITED STATES, 326 U.S. 607,612-613(1946), added to the overall harmful effect of the combined errors. (Tr.T. Vol. 11)

In light of the five days of repeated double and triple hearsay, which was not later corroborated, neither Assistant

n. 7 / UNITED STATES V. JAMES,555 f2d 992, 998-1001 (D.C. Cir. 1977);;UNITED STATES V. WEBSTER, 649 F2d 346,348-351 (5th Cir. En Banc 1981);UNITED STATES V. GREEN,648 F2d 587,597 (9th Cir. 1981)(discussing combination of errors); UNITED STATES V. O'CONNOR, 580 F2d 38,43-44(2nd Cir.1978); UNITED STATES V. DeVAUGN, 601 F2d 42,45 (1979); UNITED STATES V. WEIR,575 F2d 668,671 (8th Cir. 1978)

Attorney General John Voorhees, nor the government agents should be allowed to decide whether or not this type of prejudicial testimony is admissible, n. 8 / , and in the interest of fundamental fairness the granting of certiorari and summary reversal is requested.

Some "basic error(s) of law" are so fundamental to "our system of justice" as to require correction on a direct Federal appeal of a conviction.

The errors and issues set out by your 'pro se' petitioner are submitted as supporting either a decision by this Court, or summary reversal, in the interests of fundamental fairness, and the most basic right to a "fair trial". (U.S.C.A. 5,14)

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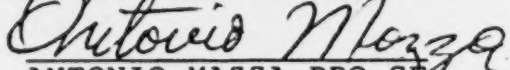
n. 8 / "Sed quis custodiet ipso Custodes?" (But who is to guard the guards themselves?) Decimus Junius Juvenal. c. 50-130 A.D. Barlett,Jr., FAMILIAR QUOTATIONS,p. 139

Conclusion

For the foregoing reasons the petition should be granted.

RESPECTFULLY SUBMITTED,



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on the petition,

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APPENDIX "A"

JUDGEMENT AFFIRMING CONVICTION

DECISION ON REHEARING AND REHEARING EN BANC (7/24/86)

DECISION IN U.S. V. MAZZA, 792 F2d 1210 (1986)

UNITED STATES COURT OF APPEALS
FOR THE
FIRST CIRCUIT

No. 85-1183

UNITED STATES
Appellee

V.

ANTONIO MAZZA,
Appellant

JUDGMENT

Entered June 3,1986

This cause came to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered,adjudged and decreed as follows: The Judgment of the District Court is affirmed.

By the Court,
Francis P. Sciqliano
Clerk

UNITED STATES COURT OF APPEALS
FOR THE
FIRST CIRCUIT

No. 85-1183

UNITED STATES,
Appellee

V.

ANTONIO MAZZA,
Appellant

Before

Campbell, Chief Judge,
Aldrich and Rossenn*, Senior Cir. Judges,
Coffin, Bownes, Breyer and Torruella,
Circuit Judges

ORDER OF THE
COURT

Entered July 24, 1986

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing En Banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the suggestion for rehearing en banc be hereby denied.

By the Court,

Francis P. Scigliano,

CLERK

•Of the Third Circuit sitting by designation

UNITED STATES COURT OF APPEALS
FOR THE
FIRST CIRCUIT

No. 85-1183
85-1184

UNITED STATES,
Appellee

V.

ANTONIO MAZZA,
ANTHONY DECOLLOGERO,
Defendants/Appellants

Appeals From The United States
District Court For The District
Of Massachusetts
(Hon. A. David Mazzone,US Dist.Judge)

Before

Breyer, Circuit Judge,
Aldrich and Rossenn,Senior Circuit
Judges

June 3,1986

BREYER, Circuit Judge. Antonio Mazza and Anthony DeCologero appeal their convictions for conspiracy to possess cocaine with an intent to distribut it. 21 U.S.C. § 846. They primarily attack the way in which the government first presented its case to the jury, namely, but having two government agents describe what an informer had previously told them about what the appelants said and did in a series of meeting with the informer. We agree with the appelanst that the admission of this descriptive testimony was erroneous; but we also think the error was harmless. In Part I we shall set out a length how we reach this conclusion. In Part II we shall consider the appellants' other arguments, none of which, in our view, warrants a new trial.

I

Our analysis of the appelants' main argument depends heavily on the specific

facts of the case. We shall first summarize these facts, then discuss the basic error of law, and finally explain why we think that error was harmless.

A

The government's evidence, much of which was on tape, shows the following series of events, all of which took place in late summer of 1984.

August 3: Agents of the federal Drug Enforcement Administration lawfully searched the home of Armand Barrasso. They found about a pound of cocaine. In return for a promise to recommend leniency to his eventual sentencing judge, Barrasso promised to help the DEA by becoming an informer. His actions during the ensuing investigation of the appellants were closely supervised by two DEA agents, Peter Vinton and Daniel Doherty.

August 7: Barrasso told Doherty that

"Tony Ramo" had called and wanted to see him. "Tony Ramo" turned out to be an alias for Antonio Mazza, one of the appellants. Barrasso met Mazza that afternoon at the Sports Page Lounge in Revere, Massachusetts. Mazza introduced him to Anthony DeCologero, the other appelant. According to Barrasso, the appellants asked him to supply six kilograms of cocaine per month, as well as some marijuana, but Barrasso said he wasn't interested.

August 13: After consulting with the DEA agents, Barrasso called Mazza and left a recorded message, stating, "When I catch up with ya, I wanna talk to you about something. May be comfortable for both of us." (The jury heard a tape of the message.)

August 14: Barrasso called Mazza. Barrasso aid Mazza had put him in a

"peculiar position" and that Barrasso would "need and explanation" from Mazza "before I can talk to you." Mazza replied that he was "trying to form the company to go to work, and this is it." Barrasso and Mazza agreed to meet again. (The jury heard a tape of the call.)

August 15: Barrasso called Mazza. Mazza said that he had spoken with his "other friend" and that he (Mazza) wanted to see Barrasso about something "very important." (The jury heard a tape of the call.) Barrasso met Mazza that evening at Mazza's home. According to Barrasso, Mazza showed him six or seven ounces of cocaine and asked him if he (Barrasso) could get him cocaine "to take care of something local."

August 16: Barrasso called Mazza. Mazza said, "(M)y guy. . . (is) desperate. . . . He'll go along with any-

thing I tell him to do." They agreed to meet at a restaurant that afternoon. (The jury heard a tape of the call.) Barrasso then met Mazza and DeCologero at Mario's Restaurant in East Boston. According to Barrasso, DeCologero told him "(h)e was ready but . . . (t)hey wanted the narcotics brought up to Boston" before paying. Barrasso said he would try to arrange things. Later that day Barrasso called Mazza and told him he was going on vacation but would be in touch when he got back.

September 5: Barrasso called Mazza and said he was "back from vacation." Barrasso asked to meet "with you and your friend," and set up a meeting for that evening at the Heritage Flooring store in NOrth Reading. (The jury heard a tape of the call.) At the evening meeting (which Barrasso secretly

recorded) Barrasso explained his not having been in touch by saying "other things turned up." He said he had gone "down there" and his source had agreed to "come up here." DeCologero said he had "moved" twelve "pieces" since last speaking to Barrasso. He told Barrasso, "I'm on consignment with people. They're on consignment with me. Understand? I have the biggest hook-up in New England. With my boats and everything." Mazza asked Barrasso whether he had worked out "that other thing" involving "the smoke . . . the weed." DeCologero said, " I can move at least 20 - - 20 thousand pounds of that shit. I mean if you got ah, the smoke . . . . The other stuff I can move three or four. I told you, maybe 5-6 a month." DeCologero added that he had "done

enough dealings with a lot of people in New England. . . . I know everybody there is possible to know." He told Barrasso not to worry about getting hur by "outlaw" drug dealers. "If there's any trouble on that end of it," DeCologero said, "I'll take care of it. . . . I got an army you understand. . . . I don't fuck around."

Barrasso told Mazza and DeCologero, "Here's what I can do. . . . They'll bring the stuff up like that there. . . I know that the money is here. I just pick up the phone and say the money is here, bang." Barrasso added that DeCologero did not have to "give" him any money, "(a)s long as I see the money." He said the price would be "32." Mazza said they wanted "3 pieces tommorrow." Barrasso said DeCologero should come up with "about sixty up front." DeCologero eventually replied,

"I can come up with a little better than 40." All three agreed to meet in the parking lot of the Hilltop Steak House in Saugus. At one point in the meeting Barrasso showed Mazza and DeCologero a sample of cocaine (supposedly from his Florida source but actually supplied by the DEA). (The jury heard a tape of the Heritage Flooring conversation.)

September 6: Barrasso and Mazza spoke by phone. They arranged a meeting for that evening. (The jury heard tapes of the calls.) According to Barrasso, Mazza asked at the meeting whether Barrasso could help him with a separate cocaine deal.

September 7: Barrasso met Mazza and DeCologero at the Hilltop Steak House. According to Barrasso, DeCologero told him that the money was in the trunk of

his car. Barrasso said he did not actually see the money. Barrasso spoke to the DEA agents by phone during the meeting. (He pretended he was talking to his "Florida source.") At one point, Barrasso told Agent Vinton there was "a problem"; Vinton told Barrasso he should leave the meeting. (Barrasso secretly recorded the meeting; the government introduced the resulting tape into evidence, but did not play it for the jury.)

September 15: Barrasso called Mazza from Miami and told him, "(T)hey're going to leave with that thing. It's all set." Mazza told Barrasso to call him when he returned to Boston. (The jury heard tapes of both calls.)

September 20: Barrasso called Mazza twice and arranged a meeting at the Meridien Hotel in Boston. (The jury

heard tapes of both calls.) Barrasso, Mazza, DeCologero, and DEA agent John Kelly (masquerading as the "Florida source") met in the Meridien lobby at 1 p.m. Kelley testified that he told the defendants he had "two kilos of cocaine" in Boston and he "understood they wanted to do some business"; but, he said they would see no cocaine until he saw the money. Mazza replied, "(T)here has to be some trust here." He said he was "in organized crime up here" and he was "out on bail for first-degree murder." DeCologero asked Kelly how he wanted to do the deal. Kelly the key to the trunk, and let him see the money; he would then deliver the cocaine. After further discussion - - the appellants said they would get the money and "get back" to Kelly.

Late that afternoon, Mazza called

Kelly at the Meridien, acknowledged that he had "the thing," and arranged to meet Kelly in the hotel lobby. Kelly and Barrasso then met Mazza and DeCologero in the lobby. DeCologero said he had the money. He went with Kelly into the men's r-om, where he showed him a canvas bag filled with cash. The two men returned outside and met with Mazza and DeCologero and seized the canvas bag containing $64,000. (The evidence about the Meridien meetings consisted primarily of Kelly's testimony, along with tapes of the phone calls involved.)

B

The appellants' major claim on this appeal is that the way in which the government presented its case to the jury was unfair. Before calling Barrasso to describe what happened during the August and September meetings, the government

called DEA agents Doherty and Vinton, who supervised the investigation of Mazza and DeCologero. On direct examination, the agents were permitted to describe what Barrasso had told them outside the courtroom about what he and the appellants had said and done in these conversations, at which the agents were not present. Indeed, in at least one instance, one of the agents testified about what Barrasso had told the other agent (outside the courtroom) about one of his conversations with the appellants. The agents' testimony contained many statements by Barrasso that, if taken as true, would strongly incriminate the appellants. Indeed, the jury initially heard much of the story that we have presented in Part A, supra, through the government agents' descriptions of what Barrasso had told

them out of court. This way of presenting the evidence, the appellants claim, led the jury to hear the government's case three times--twice out of the mouths of the government agents, in the form of inadmissible hearsay testimony, and only later in the form of admissible testimony by Barrasso himself. Barrasso, they add, was a highly untrustworthy witness whose credibi-ity was unfairly enhanced by the government's manner of proof.

In our opinion, both reason and authority indicate the appellants are right about the inadmissibility of the challenged testimony of the goernment agents. Technically speaking, the agents' testimony was not hearsay, for the court repeatedly cautioned the jury not to consider the out-of-court statements for their truth, but, rather, to consider

them as "background," or as shoing "the basis for the actions taken by the government." The court apparently meant for the jury to take the agents' accounts of what Barrasso told them as showing only the fact that Barrasso said certain words to the agents, not as evidence of the truth of Barrasso's out-of-court words. See Fed.R.Evid. 801(c) (evidence of out-of-court assertion is not hearsay if not offered to prove the truth of the matter asserted); United States v. Mancillas, 580 F. 2d 1301, 1309 (7th Cir.), cert. denied, 439 U.S. 958 (1978). Nevertheless, as we shall explain below, the risk that the jury would consider those words for their truth was great, and the government's need to present thme to the jury - - through the agent's testimony - - was virtually nonexist-

ent. Because the "probative value" of the agents' testimony was "substantially outweighed by the danger of unfair prejudice," it should have been excluded under Rule 403 of the Federal Rules of Evidence.

We fully recognize that out-of-court statements are often admissible for non-hearsay purposes and that a district court has considerable leeway in applying Rule 403. Nonetheless, in this instance, the testimony should have been excluded, for three reasons.

First, the amount of out-of-court-statement evidence was large. Barrasso's out-of-court statements pervaded the direct examination of both agents. The agents related so many of these statements that the government effectively managed to have the jury hear a second-hand account of Barrasso's entire story through

witnesses whose credibility the jury was less apt to question.

Second, when the out-of-court statements were admitted, the risk that they could improperly sway the jury was high. The testimony might have shown facts not later corroborated; it would also likely bolster the credibility of the informer Barrasso before he took the stand. United States v. Pedroza, 750 F.2d 187, 200 (2d Cir. 1984) (admission of such statements inappropriate "where. . . the declarant does not reiterate the statements" and "also inappropriate where. . . the declarant does not reiterate the statements" and "also inappropriate where. . . the declarant does so testify, since the hearsay testimony serves to bolster the testimony, of the declarant"); United States v. Ziegler, 583 F.2d 77, 81 &

n. 8 (2d Cir. 1978) (although informer testified at trial, agent's testimony incorporating informer's out-of-court statements should have been excluded as "an attempt to obtain illegitimate c-rroboration"). The jury was particulary likely to consider these out-of-court declarations for their truth, for they directly implicated the defendants in the specific criminal acts at issue. See Mancillas, 580 F.2d at 1310 (testimonial repetition of a declarant's out-of-court carge athat the defendant. . . was engaged in specific criminality" creates "too great a risk" that jury will consider out-of-court statement for its truth). Compare United States v. Bradshaw, 719 F.2d 907, 919-20 (7th Cir. 1983) (risk of prejudice insubstantial where agent's alleged hearsay statement "was incomplete and subject to innocent interpretation").

Third, the agent's testimony about Barrasso's out-of-court statements had almost no probative value. The government says the testimony was relevant to the issue of entrapment. But, "(e)n-trapment. But, "(e)ntrapment occurs when the offense for which a defendant is being prosecuted was instigated by the law-enforcement officers and the defendant had no previous disposition to commit it." United States v. Kakley, 741 F. 2d 1, 3 (1st Cir. 1984). The fact that Barrasso told Agents Vinton and Doherty much of what he claims to have been told by the appellants has nothing to do with the appellants' 'predisposition." See United States v. Webster, 649 F.2d 346, 349 (5th Cir.1981) (en banc). And, the 'instigation' question here focused on the actions of Barrasso, not on the reasonableness of Vinton's or Doherty's behavior in respect

to what Barrasso told them. See also Webster, 649 F. 2d at 351 (government's reasonableness or good faith is "of only secondary significance" to entrapment); United States v. Russell, 411 U.S. 423 (1973); 2 C. Wright, Federal Practice and Procedure: Criminal § 495, at 769 (2d ed. 1982) (doubtful whether jury has any role in considering issue of inducement).

In context, the government could simply have asked the agents to testify that they debriefed Barrasso after his conversations with the appellants. The government could--and should--have left Barrasso to testify about the substance of those conversations. See also United States v. Walker, 636 F. 2d 194 (8th Cir. 1980) (no error where agent "did not testify as to any statement made by the confidential informant," but

merely testified as to his own behavior
ased on information he received from the
nformant"); Ziegler, 583 F.2d at 81-82
.9 (agent could recount his instructions
o informer, but could not recount
nformer's narration to agent repeating
lleged statements by defendant to
nformer). In sum, the amount of potent-
ally prejudicial testimony admitted,
ombined with the lack of need, convinces
s that its admission was erroneous.

Case law involving this type of
estimony supports this conclusion.
here, as here, the risk of prejudice
s great and the need for the testimony
s small, appellate courts have insisted
n exclusion. See Webster, 649 F.2d at
51; Ziegler, 583 F.2d at 81; Mancillas,
80 F.2d at 1310. The cases that allow
rguably similar testimony involve greater
eed, less risk of prejudice, or both.
ee United States v. Echeverry, 759 F.2d

1451, 1457 (9th Cir. 1985) (little risk of predjudice in allowing agent's second-hand testimony where out-of-court declarant did not directly implicate defendants, had little motive to exaggerate, and was speaking against penal interest); United States v. Hunt, 749 F. 2d 1078, 1082-84 & n. 8 (4th Cir. 1984) (agents' testimony was probative of government's motives, which were drawn in issue by due process defense; testimony "did not bear in any way" on entrapment defense), cert. denied, 105 S. Ct. 3479 (1985).

C

The remaining, and more difficult, question is whether the error proved harmless in light of other, properly admitted evidence. To answer this question, we have reviewed the entire record; we have considered the likely impact of

the error on the minds of the jurors, Kotteakos v. United States, 328 U.S. 750, 763-64 (1946); and we have asked ourselves whether we can say "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the (jurors') judgment was not substantially swayed by the error," id. at 765; accord United States v. Pisari, 636 F. 2d 855, 859 (1st Cir. 1981); see Fed. R. Crim. P. 52 (a) (error harmless if it "does not affect substantial rights"). Compare Chapman v. California, 386 U.S. 18, 24 (1967) (higher standard for federal constitutional error).

To answer these questions, we have located each instance in which Doherty or Vinton brought potentially prejudicial out-of-court statements to the jury's attention, and compared this

testimony with other, corroborative evidence that was properly admitted. Cf. United States v. Indelicato, 611 F.2d 376, 384 (1st Cir. 1979). Barrasso's later, admissible testimony offers only some, not total, corroboration, since the agents' improper testimony arguably preconditioned the jurors to overvalue Barasso's creditibility. We shall describe our results in detail, in part to show precisely how inadequate care in the conduct of a trial can convert an overwhelmingly strong prosecution case into a difficult issue on appeal.

The following summary sets out the improper testimony and the evidence corroborating it:

Event 1: Mazza calls Barrasso on August 7.

Out-of-court statement: Vinton testified that Doherty told him that "Tony Ramo (an alias for

Mazza) had called (Barrasso) on the telephone and requested a meeting to discuss a cocaine transaction." Doherty testified that Barrasso told him "he had just spoken with a man called Tony Ramo and . . . Mr. Ramo had set up a meeting . . . for one p.m. that afternoon."

Corroboration: Barrasso testified that Tony Ramo called him on August 7. Ramo, he said, "just asked me if I would meet with him and talk with him."

Event 2: Barrasso meets Mazza and DeCologero at the Sports Page Lounge on August 7.

Out-of-court statement: Doherty testified that Barrasso "told me he met with Mr. Ramo in Revere. At that time, he was

introduced to another individual . . . and the only thing he could remember, his name, he was introduced to him as Tony. . . . (Barrasso) told me Mr. Ramo and another individual were looking to purchase a quantity of cocaine on a montly basis. . . Six kilograms of cocaine per month. . . . (T)hey also discussed Mr. Barrasso supplying them with marijuana." ("Tony" was later identified as DeCologero.)

Corroboration: Barrasso testified about the meeting as follows:

Q. Where was Mr. Ramo when you arrived at the Sports Page Restaurant?

A. He was out front waiting for me.

Q. What happened when you went

inside?

A. We sat down at a table, and he introduced me to another gentlemen. . . . A man called Tony, another Tony.

. . . .

Q. What did Tony Ramo say at that meeting, sir?

A. He asked me if I could get narcotics.

. . . .

A. He said to me if I could get narcotics for him.

Q. What type of narcotics?

A. Cocaine.

Q. How much?

. . . .

A. Six kilos.

Q. How frequent did he want those six kilos?

A. Six kilso on a montly basis or

so. . . .

He asked if I could get six kilos on a monthly basis.

Q. Did he mention any other type of narcotics?

. . . .

A. Marijuana.

. . . .

Q. Now, did the other gentleman who was introduced to you as Tony say anything at this meeting?

A. Yes.

Q. What did he say?

. . . .

A. He mentioned that they were capable. . . .

I don't remember the words exactly. . . .

He mentioned that he could move upwards of six kilos of

cocaine and the cash for them was there, there was plenty of cash, cash could be up front and in full if it had to be.

Q. What did you say to Mr. Tony Ramo and the other individual who was introduced to you as Tony?

. . . .

A. I mentioned I couldn't do anything for them.

In addition, a reference to this conversation appears on the recording of Barrasso's meeting with the appellants on September 5:

> Barrasso:. . . If you remember our first conversation. You remember you called me up. You said

to me like " I have a friend that wants something. The money's up front." You said to me.

Mazza: Right. Right.

Barrasso: This is what you said. He wants six pieces a week. I mean.

Mazza: About -- within a month.

Barrasso: I'm saying the conversation that we had.

Mazza: Right. Right.

Barrasso: OK. So I went down. I told them "the guy's going to move six pieces a month." But, "it may not be all six pieces at one time. It may be two. And then the next week he may want two."

Event 3: Barrasso meets Mazza at Mazza's condominium in Saugus on August 15.

Out-of-court statement: Vinton testified that Barrasso told him the following about his meeting with Mazza:

Q. What did Mr. Barrasso tell you with respect to the meeting?

A. Mr. Mazza agreed to set up a meeting the following day with his man, Tony, and that he would call back later that night or the first thing the next day to inform Mr. Barrasso where the meeting would occur. They would have telephone contact the next day to firm up the exact location of the meeting.

. . . .

Q. Were there discussions about cocaine at that meeting?

A. Yes, there was.

Q. What did Mr. Barrasso tell you after the meeting concerning what Mr. Mazza had said about cocaine?

. . . .

A. That Mr. Mazza wanted six kilograms of cocaine per month and that the money was going to stay in Boston.

Doherty testified that after the meeting:

> (Barrasso) told me he had met with Mr. Mazza and they had discussed a cocaine transaction. . . Mr. Mazza told Mr. Barrasso he was still interested in the cocaine transaction that he

had spoken to him earlier that week about and that he was looking to get a separate quantity of cocaine himself.

According to Doherty, at the meeting Mazza showed Barrasso a quantity of cocaine, which Mazza said he had gotten from a source in New York.

Corroboration: Some of Vinton's testimony does not require corroboration because it was admitted into evidence at the request of Mazza's counsel. After Vinton testified that Barrasso had told him "the sum and substance of the meeting,: Mazza's counsel stated, "(Vinton) said he discussed the sum and substance. Let's hear it." DeCologero's counsel did

not object. Both counsel later objected to Vinton's testimony about Mazza's telling Barrasso he wanted cocaine.

Doherty's testimony, in respect to DeCologero, went no further than Vinton's. In resepct to Mazza, Doherty did go further, in that he referred to Mazza's having shown Barrasso some cocaine. Barrasso corroborated the latter event in his own testimony:

Q. What did (Mazza) show you, Mr. Barrasso?

. . . .

A. I don't recall what was said. He showed me some cocaine.

Q. What did he say about that cocaine?

. . . .

A. That he had just picked up from New York?

Q. How much cocaine had he picked up from New York?

. . . .

A. Six or seven ounces.

Q. What did he say about that cocaine?

. . . .

A. He asked me what I thought of it, and I looked at it and I said, "It looks okay. Use this for your friend if you are so anxious to get it, use this for your friend."

Q. What did he say about the price?

A. He said it was too expensive for him.

Event 4: Barrasso meets Mazza and DeCologero at Mario's Restaurant on August 16.

Out-of-court statement: Vinton testified that after meeting with the appellants, Barrasso "told me that Tony did not want six kilograms of cocaine per month but he only wanted them two at a time and that the money was going to stay in Boston and not go to Florida."

Corroboration: Barrasso testified that his conversation with the appellants went as follows:

Q. What did the other gentleman (DeCologero) say regarding your drug deal?

A. They didn't like the way things were going, why we couldn't get. . . . He said it wasn't a good way to do business, it was no way to do business.

. . . .

Q. What else did he say?

A. I can't recall.

Q. What did he say about the money?

. . . .

A. He was ready but (t)hey wanted the narcotics brought up to Boston.

. . . .

A. I said I'd try to rearrange so the drugs could be brough to Boston and paid for in Boston.

Event 5: Barrasso meets Mazza and DeCologero at Heritage Flooring on September 5.

Out-of-court statement: Vinton testified that after this meeting, Barrasso told him that Mazza and DeCologero agreed to meet Barrasso

the next day and show him $64,000, enough money for two kilograms of cocaine. Corroboration: Barrasso wore a body recorder to this meeting, and the resulting tape was played for the jury. Although it is not clear from the tape that the appellants agreed to show Barrasso $64,000, the tape makes plain that DeCologero said he would try to show at least $40,000. For a summary of relevant parts of the conversation at Heritage Flooring, see the discussion above at pp.4-5. Besides the tape, there was substantial corroboration

from DeCologero himself, who testified as follows:

Q. Now, when you arrived at the Heritage Flooring, you had a talk with Mr. Barrasso, did you?

A. Yes.

Q. Did you tell him what you would do?

A. I told him I would show him the money.

. . . .

Q. Did he tell you the price would be $32,000 per kilo?

A. Yes.

. . . .

A. He said that it would go through for him with a price like that, 32-- I didn't know the price, but he mentioned 47 earlier--that I would make

a substantial amount if I would have to show 32 for each package.

Event 6: Barrasso meets Mazza and DeCologero at the Hilltop Steak House on September 7.

Out-of-court statement: Vinton testified that while the meeting was in progress, Barrasso told him by phone that "Mr. DeCologero had brought the money, that the trunk of the car (supposedly containing the money) was up, and that Mr. DeCologero was telling Mr. Mazza to go look at the money. Barrasso then told me Mazza refused, saying, 'I believe you. If you say the money is there, I believe you.' With that, Mr. Barrasso told me that he did not feel or he did

not go look at the money. He refused to look at the money also. He told me, he said, 'There's a problem.'"

Corroboration: Barrasso testified that while he and Mazza waited for DeCologero in the Hilltop parking lot, Barrasso said that once he saw the money, the narcotics would come up from Florida. According to Barrasso, when DeCologero arrived, he said the money was in the trunk of the car. Barrasso said he did not look inside the trunk.

Barrasso wore a body recorder to this meeting. The

resulting tape was put into evidence, but apparently was never played for the jury. We have listened to the tape. Although it is hard to make out some of the conversation, enough is intelligible to show that DeCologero claimed to have brought money to the Hilltop and that Barrasso left without seeing it. In fact, DeCologero's own testimony about what happened at this meeting does not differ substantially from the government's version. On direct examination, DeCologero stated the following:

Q. . . . . Now, you drove, as you testified, to the

the Hilltop parking lot on the 7th. When you went there, did you have something with you?

A. Yes, I did.

Q. What did you have?

A. I had $55,000.

Q. When you got there, did you meet Mr. Barrasso?

A. Yes, I did.

Q. Did you show the money to Mr. Barrasso?

A. No I didn't.

Q. Would you tell his Honor what happened when you went there?

A. I pulled into the Hilltop parking lot ans saw Mr. Barrasso standing near the phone and I parked

near the phone. He came over to me and asked me if I had the money. I told him I did. Then all of a sudden, he went back to the phone where Mr. Mazza was standing and says to Mr. Mazza, "I believe you, I believe you, he has the money." He didn't see the money at all.

Q. Then what did he do?

A. Then he was walking away from Mr. Mazza and myself, and he says that he was going to go and he believed I had the money, that he would get in touch with Mr. Mazza.

Event 7: DeCologero shows undercover agent Kelly a bag full of cash in the men's room of the Meridien Hotel on September 20.

Out-of-court statement: Vinton testified that "(a)fter meeting with Special Agent Kelly, Mr. DeCologero showed Mr. Kelly a quantity of money.

. . . ."

Corroboration: Kelly testifed that, after meeting Mazza and DeCologero in the lobby of the Meridien, he and DeCologero went into the men's room, where DeCologero showed Kelly a bag full of cash. (Mazza and DeCologero were then arrested.)

There was also corroboration

from DeCologero himself. He testified:

A. We wento into the Meridien Hotel.

Q. Did you have something with you?

A. I had money with me.

Q. How much money did you have?

A. $64,000.

. . . .

A. Mr. Kelly asked me if I had the money. I told him I did. He suggested for me to go into the men's room with him and look at it.

Q. Did you go in?

A. Yes, I did.

Q. Who wento into the men's room?

A. Mr. Kelly and I.

Q. In the men's room, will you tell his Honor and the jurors what happened?

A. In the men's room, I gave Mr. Kelly the bag and told him the money was in there and if he wished to count it, it was there. He went into one of the men's stalls and looked into it and then handed me back the bag.

Having reviewed this evidence, we are satisfied that the admissible testimony overwhelmingly established the defendants' guilt, and we are therefore virtually certain that admission of the agents' improper testimony in respect to events 5, 6 and 7 did not affect the jury's judgement. As to event 5, the jury heard a tape of

precisely what occurred. As to event 6, Vinton's synopsis of what went on at the Hilltop does not differ significantly from DeCologero's version. As to event 7, Vinton's testimony was corroborated by Agent Kelly, testifying from first-hand observation, and Kelly's veracity was not in serious doubt.

Events 1, 2, 3 and 4 pose more serious questions. Nonetheless, we conclude it is "highly probable" that the testimony in question "did not affect the (jury's) judgement." Government of Virgin Islands v. Toto, 529 F. 2d 278, 284 (3d Cir. 1976) (quoting R. Traynor, The Riddle of Harmless Error 35 (1970)). Except in respect to the issue of entrapment, the tape recordings and other independent evidence (such as Agent Kelly's testimony) presented an overwhelming case. The strength of that case makes the improper testimony harmless in respect to

proving the usual elements of criminal conspiracy. In respect to Mazza's entrapment defense, the challenged testimony was also harmless. We do not believe it could have made a difference, given the remaining evidence of Mazza's actions, intent, and predisposition. Cf. United States v. Fera, 616 F. 2d 590, 597 (1st Cir.) (defendant was not entitled to jury instruction on entrapment where there was no evidence of his unreadiness to commit the offense), cert. denied, 446 U.S. 969 (1980).

DeCologero's case, in respect to entrapment, is more difficult because he testified to a specific, conflicting version of events 2 and 4. According to DeCologero, Mazza invited him to the Sports Page Lounge on August 7 to discuss a real estate transaction. They were joined by Barrasso, whom DeCologero had never met before. DeCologero mentioned he had $50,000 he wanted to invest.

Barrasso said DeCologero could double his money by participating in a cocaine deal, but DeCologero said he didn't do that kind of business. On August 16, DeCologero met Mazza at Mario's Restaurant and, to his surprise, found Barrasso there. DeCologero repeated that he was not interested in a cocaine deal, and walked out. Barrasso followed him outside, grabbed him by the arm, told him Mazza "fe(lt) bad about you walking out like that," and persuaded DeCologero to come back inside. Barrasso then said that he needed "to get back in good standing" with his Florida cocaine suppliers and that he wanted DeCologero simply to "show" -- not to "give" -- enough money for two kilso of cocaine. In return, Barrasso would double DeCologero's money, while forgiving a debt Mazza owed Barrasso. DeCologero refused and walked out. Later, on September 5, without any further conversations with Barrasso,

DeCologero agreed to show the money. On the way to to the September 5 meeting at Heritage Flooring, Mazza told him, "If you are going to show Mr. Barrasso money, you better start talking like you know what you are doing." This, DeCologero says, explains his recorded remarks at Heritage Flooring about his extensive experience in the narcotics trade.

For the out-of-court statements about events 1 through 4 to have made a difference in respect to DeCologero's entrapment defense, the jury would have had to believe DeCologero's version of the relevant events and believe that his verison showed entrapment, namely, that the government instigated an offense he was not predisposed to commit. This conclusion, while logically possible, requires heroic assumptions about the rest of the evidence. Consider, for example, DeCologero's recorded comments on September 5 at Heritage Flooring: he told Barrasso he had "moved" twelve "pieces" since their last

conversation; he spoke at length about recent dealings with an Hispanic cocaine supplier; and he boasted of having not only "the biggest hook-up in New England" but also an "army" of people to protect him. In light of these remarks, it seems highly unlikely that the jury would have doubted DeCologero's predisposition. Of course, DeCologero tried to explain his comments away as mere bravado: "I told (Barrasso) a lot of things to build myself up like I knew what I was talking about. . . to show him that I didn't want any games played with my money." But how could one accept both (1) DeCologero's claim that Barrasso pressured a known 'innocent' (DeCologero) into taking part in the cocaine deal, and (2) DeCologero's claim that he had to deceive Barrasso about his own prior experience in dealing cocaine? If the point of DeCologero's showing the money' was, as he put it, to

help Barrasso "get back in good standing" with his Florida source, wouldn't the person DeCologero needed to 'impress' have been, not Barrasso (his 'corrupter'), but the source (whose confidence Barrasso was trying o regain)? And, even if one assumes DeCologero felt some need to 'impress' Barrasso, could one reasonably believe both (1) that in August DeCologero presented himself to Barrasso as a stranger to the narcotics trade, and (2) that less than a month later DeCologero tried to pass himself off to Barrasso (an experienced Boston-area drug dealer) as having "the biggest hook-up in New England" and as knowing "everybody there is possible to know"? Considerations like these make it hard to accept even DeCologero's version of the events as showing that he was an "unwary innocent," United States v. Russell, 411 U.S. at 436, who was 'corrupted' into committing a crime. In sum, the logical

possibility that, in the absence of the challenged testimony, the jury would have both accepted DeCologero's story and concluded that it showed entrapment is no more than that -- a logical possibility. In light of the overwhelming proof of guilt emanating from the properly admitted evidence, particularly the evidence on tape, we find it highly probable that the DEA agents' improper testimony did not substantially sway the jurors' judgement in respect to DeCologero's entrapment defense, or the other issues in the case. We therefore cannot, in good conscience, find the error other than harmless.

II

The appellants make several other arguments, which they believe show that their trial was unfair and that they should have a new one. We shall discuss these arguments briefly, indicating our basic

reasons for finding them legally inadequate.'

A

Mazza says that the district court erred in agreeing to admit three pieces of evidence showing "prior bad acts," namely, (1) evidence of Mazza's recent state court murder conviction, (2) Barrasso's testimony that Mazza had bought cocaine from him ten times before the alleged conspiracy began, and (3) Agent Kelly's testimony that during the Meridien meeting Mazza said he was "in organized crime up here" and was "out on bail for first-degree murder." Mazza says these pieces of evidence should have been excluded under Rules 404(b) and 403 of the Federal Rules of Evidence. Rule 404(b) bars evidence showing that a defendant on trial for one crime has been involved in some other bad act, if the evidence is introduced solely to prove that the defendant has a bad character and therefore might commit crimes of

the court for which he is on trial. See United States v. Johnston, 784 F. 2d 410, 425 n. 10 (1st Cir. 1986). If the evidence proves relevant in some other way, however, it is admissible, subject only to the balancing test of Rule 403. See id.

Mazza cannot here complain about the first piece of evidence -- the murder conviction -- because the court did not admit the evidence. Rather, relying on Fed. R. Evid. 609(a), the court ruled that it would admit the evidence for impeachment purposes if Mazza testified. The Supreme Court has made clear that a criminal defendant cannot appeal this type of conditional ruling by the trial court. Rather, he must take the stand and give the court a chance to perform the required balancing in the concrete context of actual question and answer; only if the defendant does testify and the conviction is actually admitted may

he raise the issue on appeal. Luce v. United States, 105 S. Ct. 460 (1984). We are bound here by the decision in Luce.

The remaining two pieces of evidence were properly admitted under Rule 404(b) because they were offered for permissible purposes. The evidence of Mazza's prior cocaine purchases from Barrasso suggests a predisposition to buy cocaine, an issue that became material in light of Mazza's entrapment defense. See United States v. Russell, 411 U.S. 423, 429 (1973) ("(I)f the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.") (quoting Sorrells v. United States, 287 U.S. 435, 451 (1932)); United States v. Parrish, 736 F. 2d 152, 156 (5th Cir. 1984) (per curiam); 2 D. Louisell & C. Mueller,

Federal Evidence § 140, at 241-46 (rev. ed. 1985); 2 J. Weinstein & M. Berger, Weinstein's Evidence 404 (04), at 404-30 to -31 (1985); see also United States v. Palow, 777 F.2d 52, 54-55 (1st Cir. 1985) ("A defendant's statements concerning future narcotics transactions are relevant to establish his predisposition to commit crimes for which the entrapment defense is asserted."), cert. denied, 106 S. Ct. 1277 (1986). And, since the evidence of the prior dealings suggests that Mazza knew Barrasso as a cocaine supplier, it is also probative in clarifying the meaning of otherwise ambiguous language in the recorded conversations between the two.

Similarly, when viewed in context, see supra p. 6, Mazza's statements to Agent Kelly (who was posing as the "Florida source") tended to show an effort by Mazza to impress Kelly with his 'experience' in the drug trade and thereby to encourage Kelly to go ahead

with the transaction. Thus, Mazza's remarks were probative of his intent, namely, his "purpose of promoting or facilitating (the) commission" of a crime. Model Penal Code § 5.03(1) (definition of criminal conspiracy). And, the court limited any possible prejudice to Mazza by instructing the jury to consider Mazza's remarks without regard to whether he was telling the truth; their significance lay in the (asserted) fact that he made them to Kelly.

Because the 'bad acts' evidence was introduced for legitimate purposes, it was properly admitted under Rule 404(b). United States v. Zeuli, 725 F.2d 813, 816 (1st Cir. 1984). And, in light of the probative value of the evidence, the court's attempt to minimize any prejudice through limiting instructions, and the rest of the record, the decision not to exclude the evidence under Rule 403 was within the court's lawful powers. See, e.g.,

United States v. Kadouh, 768 F. 2d 20, 21-22 (1st Cir. 1985); United States v. McNeill, 728 F. 2d 5, 13 (1st Cir. 1984); Zeuli, 725 F. 2d at 817.

B

DeCologero claims that the district court should have severed his trial from Mazza's because (1) Mazza would then have testified at DeCologero's trial, rather than remain silent, (2) the jury would not have associated DeCologero with Mazza's prior bad behavior, and (3) the jury would not have blamed him for Mazza's outburst during trial.

To obtain severance for the first of these reasons, DeCologero had to show the district court that Mazza would in fact testify at a separate trial and that his testimony would in fact prove exculpatory. United States v. Arruda, 715 F. 2d 671, 679-80 (1st Cir. 1983); United States v. Smolar, 557 F. 2d 13, 21 (1st Cir.), cert. denied, 434 U.S. 866,966,

971 (1977); see United States v. Reis, No. 85-1240, slip op. at 13 (1st Cir. Apr. 8, 1986). When DeCologero first raised the point -- on the ninth day of trial -- the district court told his counsel "to provide me with a sufficient specific exculpatory basis for (Mazza's) testimony, a likelihood, reasonable likelihood that he would testify if he were called -- you've got to show me compelling prejudice." Counsel again asked for severance on the trial's tenth day, but he still provided only a general, conclusory assertion that Mazza's testimony would prove helpful. Although Mazza's counsel then offered to summarize how Mazza would testify, the trial court pointed out to him, "You are not the moving party"; and, DeCologero's counsel still not did offer details. Given DeCologero's failure to provide specific information, the trial court acted within its lawful powers in not ordering a sever-

ance on this ground. See P. Marcus, The Prosecution and Defense of Criminal Conspiracy Cases § 6.03(d), at 6-44 & n.77 (1985) ("(T)he burden is on the defendant() to demonstrate the exculpatory importance of the particular testimony (he) desire(s) from (his co-defendant;) 'allegations of general exculpatory testimony will not be sufficient.").

In respect to DeCologero's second argument for severance, we understand why he feared that the jury would associate him with Marsh; yet the legal rule in this area reflects a balance of considerations, including the need for effective and expeditious trials. As the Tenth Circuit has recently stated, in the absence of "a showing of clear prejudice, a joint trial of the defendants who are charged with a single conspiracy in the same indictment is favored where proof of the charge is predicated upon the same evidence and alleged acts." United States v.

the government had intercepted illegally. The government stipulated before trial that it would not introduce this portion of the September 5 tape, in which the appellants had discussed the possibility of murdering or robbing Barrasso after the drug deal. But, the appellants say, Doherty's answer is a 'fruit' of that 'poisonous tree.' And the government's effort to elicit that answer, they add, amounted to prosecutorial misconduct warranting a new trial. Compare, e.g., United States v. Westbo, 576 F. 2d 285, 289-92 (10th Cir. 1978) (misconduct warranted new trial), overruled in part en banc on other grounds, United States v. Hopkins, 744 F. 2d 716 (10th Cir. 1984), with United States v. Liefer, 778 F. 2d 1236, 1244-46 (7th Cir. 1985) (misconduct did not warrant new trial).

The trial court, however, evidently did not accept the assertion that the question to

Doherty reflected an effort by the prosecutor to put a 'poisoned fruit' before the jury. And, we are not persuaded otherwise. Vinton's fear for Barrasso might just as well have arisen fro -(1) his belief that the defendants were important narcotics dealers, (2) his 'expert' awareness of the risk of violence that often accompanies drug deals, (3) his having heart DeCologero tell Barrasso about his "army" of protectors, (4) his concern that DeCologero or Mazza might detect Barrasso's body recorder, and (5) his uncertainty about what Barrasso meant when he said there was "a problem," particularly in light of Barrasso's inability to elaborate with the appellants standing nearby. Given these possible reasons for Vinton's fear, we think it unlikely that Doherty's testimony led the jury to infer that Vinton's fear derived from some special information that Vinton knew about but the jury did not.

And, given the unlikelihood of such an inference, we cannot say the trial court abused its discretion in determining that the prosecutor did not willfully attempt to plant that inference in the jurors' minds, or that any such attempt did not result in prejudice sufficient to warrant a new trial.

For similar reasons, we reject the appellants' other grounds for attacking this testimony, namely, that it was not based on Doherty's personal knowledge, Fed. R. Evid. 602, or that it was hearsay (presumably in the sense that Doherty was relating Vinton's out-of-court explanation for telling Barrasso to leave). In light of the jury's likely inferences about the basis for Vinton's fear, see supra p. 35, as well as the rest of the record, any error in admitting Vinton's answer was harmless.

D

The appellants object to the district

court's having allowed the jury to use government-prepared transcripts as an aid to understanding the tape recordings admitted into evidence. They say that the trial judge should -imself have vertified the accuracy of the transcripts before allowing the jury to use them. The appellants, however, had copies of both the tapes and the transcripts several weeks before trial. They did not raise any objection to the use of the transcripts until the trial began, and even then, in response to a direct question from the court, they failed to id- : entify any specific material inaccuracies. Rather, DeCologero's counsel referred to "(w)ords here and there. You can't read the thing verbatim as you go along. It's highly prejudicial. Some of the tapes get clouded." The closest the appellants came to making a specific material objection was when they complained during trial about the

sound quality of the September 5 tape. Yet, the curt found this recording to have been intelligible the first time it was played; and, in any event, any initial problem with the tape's clarity was evidently cured when the prosecutor later replayed it after adjusting the treble control on the tape player.

Consequently, the appellants can prevail on this point only were this circuit to create an absolute rule requiring district judges themselves to review transcripts whenever the parties do not stipulate to their accuracy -- even in the absence of any showing of significant disparities between transcript and tape. The appellants find support for such an approach in United States v. Robinson, 707 F. 2d 872 (6th Cir. 1983), in which the Sixth Circuit suggested the trial court should "make an independent determination of accuracy by reading the transcript against

the tape." Id. at 879. But this circuit has adopted no such rule. Rather, we agree with the Fourth Circuit that "defendants, on the strength simply of general objection to transcripts, (cannot) place the district court in the position of either having itself to undertake the laborious process of verifying the accuracy of the transcripts or having to rpevent the government from using transcripts at all to aid in the presentation of tape recorded evidence." United States v. Collazo, 732 F. 2d 1200, 1203 (4th Cir. 1984), cert. denied, 105 S. Ct. 777 (1985); see also United States v. Slade, 627 F. 2d 293, 302-03 (D.C. Cir.) (although parties did not stipulate to transcripts' accuracy, failure of trial court to review them in camera was not an abuse of discretion), cert. denied, 449 U.S. 1034 (1980). Thus, we find no error in the district court's decision to allow the jury to use the trans-

cripts as an aid to understanding the tapes. See United States v. Nashawaty, 571 F. 2d 71, 75 (1st Cir. 1978) (permitting use of transcripts to aid jury lies within district court's sound discretion). Compare United States v. Rengifo, No. 85-1514, slip. op. at 10-19 (1st Cir. May 6, 1986) (discussing admissibility of transcripts as evidence).

The appellants also claim that, at one point, the district court wrongly suggested to the jury that the transcripts were not simply aids to understanding the tapes, but were themselves evidence of what was said. See United States v. Richman, 600 F. 2d 286, 294-95 (1st Cir. 1979) (when transcripts are used as aids, court must tell jury that evidence consists of the tapes, not the transcripts). Specifically, when Mazza's counsel sought to replay a particular tape while cross-examining Barrasso, the judge said: "The tape is in evidence. The jury heard it. If you want to have the trans-

cript, move the admission of the transcript. That certainly is as good as the tape." (Emphasis added.)

In context, however, the judge's remark does not mean what appellants suggest. The tape in question contained Barrasso's call to Mazza on August 13, in which Barrasso said, "I want to talk to ya about something. May be comfortable for both of us." The jury had already heart this tape during Agent Doherty's direct examination. In cross-examining Barrasso, Mazza's counsel wanted to suggest to the jury that Barrasso was confused, or lying, because he had previously told a grand jury that Mazza was the one who claimed to have "something interesting" for Barrasso. Earlier in the cross-examination, however, Barrasso had explained that there was no contradiction; he had indeed made the "something comfortable" remark on August 13, while Mazza had made the "something interest-

ing" remark on a different date. Since Barrasso conceded he had made the "something comfortable" remark on August 13, the district court evidently felt that to play the tape again would be a waste of time. And, he apparently believed no one would object should Mazza's counsel seek to use the transcript to show what had been said.

Regardless, in context the remark could not have led the jury to think it was being told the transcripts were evidence just like the tapes, for the judge had instructed the jury at least four times that they were not. For example, when the prosecution was about to play the first tape, the court told the jury:

> Now, you are going to hear conversations which were recorded in this case. This is proper evidence just like all the evidence I admit. This is proper evidence for you to consider. In order

to help you further, I'm going to allow a transcript to be furnished to you. The transcript is merely to help you understand what is said on the tape. But if you believe that transcripts says something different fromwhat you hear on the tape, remember, it is the tape that is the evidence and what counts. The tapes are the evidence, not the transcripts. Any variation between the two, you must be guided solely by the tape and not by the transcripts.

In light of the clarity of this instruction and its repetition, we see no real possibility that the isolated remark quoted by the appellants could have misled the jury or prejudiced the defense.

E

The appellants argue that the court did not instruct the jury that it had to find Mazza and DeCologero had conspired with

each other; instead, they say, the jury might have found that each had conspired separately with Barrasso. The relevant part of the instructions reads as follows:

> (The government) must prove. . . beyond a reasonable doubt. . . that there was an agreement or conspiracy. . . between the defendants to possess a controlled substance with intent to distribute. . . A conspiracy. . . is a combination of (sic) an agreement of two or more persons to join together to attempt to accomplish an unlawful purpose. . . It takes at least two. It's a kind of partnership for a criminal purpose in which each member becomes the agent of each other member. The essence of the offense is the combination or mutual agreement by two or more people to disobey or disregard the law. . . So what the evidence must show in the case . . .

is that the defendants in some way, either positively or passively, came to a mutual understanidng to possess cocaine with intent to distribute it; and they willfully became members of that conspiracy.

The appellants focus on the underscored statements, which do not refer to the defendants. The other words in the instructions, however, specifically say the government had to show that "there was an agreement or conspiracy . . . between the defendants" and that "the defendants came to a mutual understanding to possess cocaine." Thus, the instruction, read as a whole, was adequate, and the court acted lawfully in refusing to give a further instruction. See United States v. Johnston, 784 F. 2d 416, 426 (1st Cir. 1986) (district court not need to give defendant's requested instructions as long as court's own

instructions are "correct and cover the issues") (quoting United States v. Fusaro, 708 F. 2d 17, 22 (1st Cir.), cert. denied, 464 U.S. 1007 (1983)).

F

Mazza challenges what he calls the districts court's "refusal" to repeat its charge to the jury. After the jury had deliberated for two hours, it asked to "rehear the judge's instructions." After conferring with all counsel, the judge told the jury:

> . . . I gave you those instructions last night, within the 24 hours, and they took about a half hour to give you. What you've said to me is you want to rehear the instructions. Well, perhaps you can focus on some part of those instructions that bother you the most or about which you are un-

clear or, to put it better, I was unclear in giving them to you.

If you want to rehear them over again, I will, of course, honor that request. I think you should give it further consideration and maybe focus in on a particular part of the instruction that bothers you the most. To hear the Judge's instructions mean for me to repeat word for word that I told you yesterday, some of which I'm sure. . . perhaps you do not require.

So would you please resume your deliberations and try to be more specific in your requests to the Court.

This does not amount to a "refusal" to instruct the jury; Mazza did not object to it at

trial; and we see no "plain error," Fed. R. Crim P. 52(b).

G

The appellants say the district court unreasonably restricted their efforts to cross-examine Barrasso. In our review of the record, we have pain particular attention to the more than 250 pages of transcript covering the cross-examination of Barrasso. We have found that the court basically tried to restrict what it saw as repetitive, argumentative, and immaterial questions. In our view, the defendants had an adequate opportunity to cross-examine and, in particular, to impeach Barrasso, and the court's effort to control the cross-examination fell well within its lawful powers. See United States v. Silvestri, No. 84-1673, slip op. at 10 (1st Cir. May 7, 1986) (noting

trial court's broad discretion in this area); United States v. Keithan, 751 F. 2d 9, 11-12 (1st Cir. 1984); United States v. Fortes, 619 F. 2d 108, 118 (1st Cir. 1980) ("The court need not permit unending excursions into each and every matter touching upon veracity if a reasonably complete picture has already been developed.").

H

Finally, Mazza makes a technical argument that we should vacate his conviction because, in his review, he was unlawfully transferred back and forth between state and federal custody before his federal trial, in violation of article IV(e) of the Interstate Agreement on Detainers, 18 U.S.C. app. Mazza did not raise this argument before or during trial, and he offers no explanation for the delay;

we therefore consider the argument waived on this appeal. United States v. Eaddy, 595 F. 2d 341, 346 (6th Cir. 1979); Christian v. United States, 394 A. 2d 1, 34-39 (D.C. 1978), cert. denied, 442 U.S. 944 (1979); see also United States v. Scallion, 548 F. 2d 1168, 1174 (5h Cir. 1977), cert. denied, 436 U.S. 943 (1982); 1 C. Wright, Federal Practice and Procedure: Criminal § 193, at 705-06 (2d ed. 1982).

We find the appellants' remaining arguments without merit.

The judgement of the district court is Affirmed.

(2)

Supreme Court, U.S.
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No. 86-873

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANTONIO MAZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals was correct in finding the admission of certain evidence to be harmless error.

2. Whether other alleged errors deprived petitioner of a fair trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-82) is reported at 792 F.2d 1210.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1986. A petition for rehearing was denied on July 24, 1986. The petition for a writ of certiorari was filed on September 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 12 years' imprisonment. The court of appeals affirmed (Pet. App. 1-82).[1]

1. The evidence at trial is summarized in the opinion below (Pet. App. 2-12). Briefly, it showed that in August and September 1984 petitioner and co-defendant Anthony DeCologero sought to obtain a regular supply of cocaine from one Armand Barrasso. Barrasso was a drug dealer who had previously agreed to become a DEA informant. Tape recordings of telephone conversations between Barrasso and petitioner or DeCologero, as well as recordings made by Barrasso of meetings with petitioner and DeCologero, were played to the jury. The recordings and other evidence showed that the defendants engaged in repeated discussions of a proposed cocaine transaction. The discussions culminated on September 20, when petitioner and DeCologero met twice at a Boston hotel with Barrasso and an undercover DEA agent, who was introduced to petitioner as Barrasso's "Florida source." In the first meeting, the "source" announced that he had "two kilos of cocaine" and that he "understood [petitioner and DeCologero] wanted to do some business" (*id.* at 10). Petitioner noted

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[1] Petitioner's sentence is to be served following a sentence of life imprisonment imposed after his conviction in state court for murder. See Pet. 7 n.2.

Co-defendant Anthony DeCologero was also convicted of conspiracy and sentenced to 12 years' imprisonment. The court of appeals affirmed his conviction as well. He has not sought review in this Court.

that he was "in organized crime up here," and he and DeCologero agreed to return later with the purchase money (*ibid.*). Several hours later, at the second meeting, DeCologero showed the undercover agent a canvas bag filled with cash. Petitioner and DeCologero were thereupon arrested.

2. At trial, DeCologero presented an entrapment defense. He testified that he had had no prior dealings in narcotics and that Barrasso had pressured him to engage in a cocaine deal. Petitioner did not testify at trial, but he also claimed that Barrasso had entrapped him.

The two DEA agents who supervised Barrasso's activities recounted what Barrasso had told them about his conversations with petitioner and DeCologero. Although the defense objected, the district court allowed the agents' testimony on the ground that the evidence was admitted not for the truth of the matters asserted but to establish the "background" for the investigation (2 Tr. 8), "to show that [the agents] acted in a certain manner" (2 Tr. 10), and to show "the basis for the actions taken by the government" (1 Tr. 20). See also 1 Tr. 21, 24-25; 2 Tr. 123-124; Pet. App. 14. The court gave repeated and comprehensive limiting instructions on the proper use of the evidence. Pet. App. 11-14.

3. The court of appeals affirmed (Pet. App. 1-82). It found that admission of the DEA agents' testimony "technically" was not hearsay, since it was admitted for a purpose other than to prove the truth of the matters asserted by Barrasso (*id.* at 13-14). The court held, however, that the evidence should have been excluded under Fed. R. Evid. 403, because its probative value was outweighed by the danger of unfair prejudice (Pet. App. 14-21). The risk that the

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jury would wrongfully consider the evidence for the truth was substantial, the court said, and the need for the agents' testimony was not (*id.* at 14-15). Nonetheless, the court concluded that the error in admitting the evidence was harmless (*id.* at 21-53). After reviewing the record, the court characterized the government's case as "overwhelmingly strong" (*id.* at 23). The court then "located each instance in which [the agents] brought potentially prejudicial out-of-court statements to the jury's attention, and compared this with testimony from other, corroborative evidence that was properly admitted" (*id.* at 22-23 (citation omitted)). See *id.* at 23-46. In connection with three of these instances, the court determined that it was "virtually certain" that the agents' improper testimony did not affect the jury's judgment (*id.* at 46). As to the four remaining instances, the court found it "highly probable" that the testimony did not affect the finding of guilt (*id.* at 47). The tape recordings and other independent evidence presented an overwhelming case, the court concluded, and the challenged testimony could not have affected petitioner's asserted entrapment defense, "given the remaining evidence of [petitioner's] actions, intent, and predisposition" (*id.* at 47-48).

The court of appeals also considered and rejected numerous other claims by petitioner, including assertions that the district court erred in certain evidentiary rulings, in its instructions to the jury, and in the restrictions it placed on petitioner's cross-examination of Barrasso (Pet. App. 53-82).

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ARGUMENT

1. Petitioner's principal contention is that the court of appeals used an incorrect harmless error analysis and that its analysis is in conflict with the standards applied by other circuits.

a. The court of appeals used the correct standard in determining that the admission of the agents' testimony was harmless error. Petitioner appears to acknowledge (Pet. 9-10) that the proper test for assessing the error in this case is the one set out in *Kotteakos* v. *United States*, 328 U.S. 750, 763-765 (1946). His claim is that the court of appeals did not follow *Kotteakos*, because it "chose to strip the error from the whole" and because it emphasized the strength of the evidence against him (Pet. 9-14). This claim is baseless. The court of appeals explicitly followed *Kotteakos*, focusing on "the likely impact of the error on the minds of the jurors" (Pet. App. 21-22) and quoting at the outset the same key passage from *Kotteakos* that petitioner relies on: "[W]e have asked ourselves whether we can say, 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the [jurors'] judgment was not substantially swayed by the error'" (*Kotteakos*, 328 U.S. at 765, quoted at Pet. App. 22). Having set out that standard, the court of appeals then followed it, carefully reviewing the entire record and scrutinizing with special care the evidence that was erroneously admitted. The court concluded that it was "virtually certain" in three instances and that it was "highly probable" in four others that the evidence did not affect the jury's judgment (Pet. App. 46-47).

Nothing in *Kotteakos* precludes a court from weighing the strength of the government's evidence

in determining whether any error is harmless. Indeed, *Kotteakos* suggests the contrary, especially in a case like this one in which the disputed evidence is cumulative (328 U.S. at 763). See also *United States* v. *Lane*, No. 84-744 (Jan. 27, 1986), slip op. 12 n.13. There is no reason to suppose that the court of appeals made the strength of the evidence its "sole criteri[on]" (see Pet. 13); rather, that factor was simply part of the court's determination of whether the erroneous evidence "affect[ed] the jury's judgment" (Pet. App. 46-47; *Kotteakos*, 328 U.S. at 765).[2]

Petitioner is also incorrect in his contention (Pet. 14) that the court of appeals' analysis is inconsistent with the concurring and dissenting opinions in *United States* v. *Lane*, *supra*. Justice Brennan's opinion in *Lane* cited *Kotteakos* for the proposition that an "error is harmless unless it had 'substantial influence' on the outcome or leaves one in 'grave doubt' as to whether it had such effect" (slip op. 8). Justice Stevens' opinion noted that *Kotteakos* established that " '[t]he inquiry . . . is . . . whether the error had substantial influence' " (slip op. 8 n.11; see also *id.* at 13 n.20). Neither characterization of *Kotteakos* is in any way inconsistent with the analysis of the court of appeals, and both opinions acknowledge that a reviewing court can properly consider the strength of the government's case, to the extent that it bears on the ultimate question—the ex-

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[2] Petitioner's contention that the evidence erroneously admitted was considered in a vacuum and "stripped from the whole" is belied by the court of appeals' explicit recognition that "Barrasso's later, admissible testimony offers only some, not total, corroboration, since the agents' improper testimony arguably preconditioned the jurors to overvalue Barrasso's credibility" (Pet. App. 23).

tent to which the erroneously admitted evidence influenced the jury. Slip op. 12 (opinion of Brennan, J.) ("the existence of overwhelming evidence is relevant to determining the 'effect the error had or reasonably may be taken to have had upon the jury's decision'" (quoting *Kotteakos*, 328 U.S. at 764)); *Lane*, slip op. 12-13 (opinion of Stevens, J.). While both separate opinions in *Lane* emphasized that reviewing courts must be cautious in their review of the evidence before determining that error is harmless (slip op. 11-12 (opinion of Brennan, J.); slip op. 12-13 (opinion of Stevens, J.)), the court of appeals' thorough analysis of the effect of the errors in this case satisfied that standard.[3]

b. Petitioner is also incorrect in his assertion (Pet. 15-19) that the court of appeals' harmless error analysis conflicts with that of the Third and Fifth Circuits. Neither the Third nor the Fifth Circuit disputes that *Kotteakos* is the proper standard for reviewing non-constitutional error.[4] The claim

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[3] The petition (at 8) states that the court of appeals erred by applying Judge Traynor's view of harmless error rather than the standard adopted in *Kotteakos*. Judge Traynor suggested that "[u]nless the appellate court believes it highly probable that the error did not affect the judgment, it should reverse." R. Traynor, *The Riddle of Harmless Error* 35 (1970). As one commentator has pointed out: "If this is more than a refining of, or a gloss on the *Kotteakos* test, it seems to be in the direction of making the standard for harmless error more rigorous so that it approaches the test used for errors of a constitutional dimension." 3A C. Wright, *Federal Practice and Procedure* § 854, at 302 (1982). The court's use of Judge Traynor's formulation of the harmless error standard therefore could not have prejudiced petitioner.

[4] The harmless error analysis in this case is clearly governed by *Kotteakos* and not *Chapman* v. *California*, 386 U.S. 18 (1967), since the court of appeals found no constitutional

of conflict therefore reduces to focusing on different articulations of the *Kotteakos* test. The differences in the language used to describe the *Kotteakos* test in particular cases do not represent a significant difference in approach. Thus, the Third Circuit, after finding the *Kotteakos* test to be applicable to an evidentiary error similar to the one in this case, found the error harmless because there was no "reasonable possibility" that the error contributed to the conviction. *United States* v. *Zarintash*, 736 F.2d 66, 72 (3d Cir. 1984). And in *United States* v. *Parry*, 649 F.2d 292, 296 (5th Cir. 1981), the Fifth Circuit found an evidentiary error to be prejudicial under *Kotteakos* because the court was "unable to say with fair assurance that the jury was not substantially influenced by the error." Neither standard is discernibly different from the standard set out in *Kotteakos* and applied by the court of appeals in this case.[6]

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error, but only a violation of Fed. R. Evid. 403. Petitioner's reliance on *United States* v. *Martinez*, 588 F.2d 495, 499 (5th Cir. 1979), is misplaced, since the court in that case did not hold that the *Chapman* test is applicable to nonconstitutional errors, but only stated—without discussion of the proper standard—that the error in that case was "harmless beyond any reasonable doubt." That passing observation did not commit the Fifth Circuit to applying the *Chapman* test to all hearsay errors; it simply established that the error in the *Martinez* case was harmless under any standard. Fifth Circuit decisions before and after *Martinez* make clear that, for nonconstitutional errors, *Kotteakos* governs. See *United States* v. *Phillips*, 664 F.2d 971, 1027 n.84 (1981), cert. denied, 457 U.S. 1136 and 459 U.S. 906 (1982); *United States* v. *Opager*, 589 F.2d 799, 803 n.9 (1979); *United States* v. *Rodriguez*, 573 F.2d 330, 333 (1978).

[6] See 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 103[06], at 103-68 (1986) (footnote omitted): "It is hard

2. Petitioner also asserts in passing that there were other errors at trial that rendered his conviction unfair.

a. First, he suggests (Pet. 6) that Barrasso could not be effectively confronted or cross-examined.[6] In fact, however, Barrasso was subject to thorough cross-examination. The defense questioned him at length about his conduct and conversations with petitioner and DeCologero during the investigation; his extensive history of cocaine trafficking; his failure to pay taxes on his narcotics income; the discovery of drugs and weapons during the search of his house; his plea agreement with the government; and his alleged bias against petitioner (Gov't C.A. Br. 23-24). At one point when petitioner objected to the limitations on his cross-examination, the district court pointed out that the "limited" cross-examination had lasted for 6 hours and 25 minutes, after a direct examination that had lasted only 2 hours and 35 minutes (8 Tr. 18). The court of appeals noted that the cross-examination covered 250 pages of the transcript (Pet. App. 80). The court of appeals correctly found that the district court had prohibited

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to discern from the cases whether the articulation of a particular test really matters. The appellate court will affirm, regardless of whether a high probability, more-probable-than-not, or reasonable possibility test is applied, when, after assessing a number of factors * * *, it does not have a serious doubt about the fairness of the trial on the outcome of the case."

[6] Petitioner also suggests there that the *agents* could not be effectively confronted or cross-examined either, but he apparently did not make that claim below (see Pet. C.A. Br. 17, 39-46; Pet. App. 80-81). In any event, the court did not improperly restrict petitioner's right to cross-examine the agents.

only "repetitive, argumentative, and immaterial questions," and that petitioner's ability to impeach Barrasso was not impaired (*ibid.*).

b. Petitioner also asserts (Pet. 20) that the district court erroneously admitted evidence of his alleged involvement in a murder. In fact, no such evidence was admitted. Petitioner apparently refers to the trial court's ruling that if petitioner testified, he could be impeached with his recent state murder conviction (see Pet. App. 55). As the court of appeals found (*id.* at 55-56), however, this Court's decision in *Luce* v. *United States*, 469 U.S. 38 (1984), makes clear that petitioner waived that claim by declining to testify.

c. Petitioner's remaining claim is that the trial court erroneously failed to respond to a jury request for supplemental instructions (Pet. 20). That claim was also properly rejected by the court of appeals (Pet. App. 78-80). Two hours after deliberations had commenced, the jury asked to "rehear the judge's instructions" (*id.* at 78). After conferring with all counsel, the court suggested that, since the entire charge had taken 30 minutes to relate, the jurors might wish to focus on the particular portions of the charge that they wished to hear again. The court made clear to the jury, however, that "[i]f you want to rehear them over again, I will, of course, honor that request" (*id.* at 79). Petitioner did not object at any time that the court's response to this request by the jury was improper (*id.* at 79-80), and the jury did not renew its request. Under these circumstances, the trial court's response was not, as petitioner claims, a "failure to answer the jury's request" (Pet. 20).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1987

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OCTOBER TERM 1986

In The

SUPREME COURT OF THE
UNITED STATES
No. 86- 873

ANTONIO MAZZA,
Petitioner

V

UNITED STATES,
Respondent

Supplemental Petition for a Writ of Certiorari to the First Circuit Court of Appeals And Opposition to Respondents' Brief in Opposition to Certiorari

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By,

Antonio Mazza Pro Se
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REPLY STATEMENT AND ARGUMENT

Contrary to respondants misstatement (Resp. Brief pp. 9 n. 6), the Petitioner properly raised his inability to confront and crossexamine the Govt. Agents (Appellants' primary brief pp. 31 top paragraph) in the Constitutional standard sufficient to allert the 1st Circuit to his claim of a denial of a fair trial. Respondants' also acknowlegde this in their opposition to the hearsay issues of Barrasso and the Agents by their reply brief (1st Cir. Appellee's primary answering brief pp. 15) in the First Circuit citing the error as harmless under the decision in United States V. Echeverry, 759 F2d 1451,1457 (9th Cir 1985) (We apply the standard of harmless beyond a reasonable doubt to Echeverry's claim) id.

In fact Petitioner submitted both CHAPMAN and/or KOTTEAKOS (Appellant's brief pp. 45) to the First Circuit, and the higher standard is preserved for review by this Court.

In Section *b.* of respondants' opposition to the petition for certiorari, Respondants' counsel Mr. Fried attempts to intentionally misdirect/mislead this Court.

In fact Petitioner clearly complained of the Governments' introduction of a pending murder trial, (Pet. for Cert. pp. 20 and cases cited at n. 7)

Respondants' intentionally misleading opposition to a seperate argument , (not presented by the Petition for Cert.), concerning a murder conviction, should not be adopted by this Court. In Fact, respondant lied.

At Tr.T. Vol. 8 pp. 161-162

Q Okay. Now what did Mr. Mazza tell you at this time ?

Mr. O'DONOVAN: Respectfully may we have the entire conversation?

A. Mr. Mazza said that he was in organized crimeup here.

MR. FARESE: Your Honor, I Object . I ask that be stricken unless he's got a recording of it.

THE COURT. It May Stand.

Q What else did he say ?

A And that he was presently out on bail for First-Degree murder.

MR. O'DONOVAN. May this Be Stricken?

MR. FARESE: Move for a Mistrial.

THE COURT: NO.

Q What did you say in response ?

THE COURT: Overruled. I should say, for the reasons I already stated at side bar, but also, this is not a case in which the jury should consider whether or not these are truthful statements. In other words, it is not of concern to you whether indeed, if Mr. Mazza said it at all, which is up to you, that he is indeed a member of organized crime or that he was on bail for murder. It doesn't matter whether that's true or not. What you have to decide is whether it wassaid at that time.

The First Circuits' consideration of the above-admitted evidence (admitted at trial) is set out in the Appendix pp. 57-58.

In a *Third* area of intentional misrepresentation, Solicitor General Fried's opposition pp. 10, ommits even more than the First Circuit did in the 52b analysis of Judge Mazone requiring a unanimous vote by the

jury in their second day of deliberations, as to which piece of tape, or which specific instruction they wished to rehear.

In Fact the jury came back with (2) TWO questions; the first was a request to rehear the tapes; and the second was to rehear the judges instructions (Tr.T. Vol. 11 pp. 9). In the pre-reinstruction colloquy only the request for rehearing the tapes was discussed by Judge Mazzone and counsel (Vol. 11, pp 1----9) and Judge Mazzone required the jury to unanimously decide which tapes they wished to rehear.(Vol. 11, pp. 9). This had a spillover effect and possibly the defense was temporarily paralyzed when the Court summarily chastised the jury for wishing to make him repeat his 30 minute instructions.(Which he said then must include the naming of the foreman....and some other things he was sure they may not need to hear.)

Judge Mazzone actually answered:

Q. The second request is:

"Could we rehear the Judge's instructions?"

JUDGE MAZZONE: "At this time I'm going to deny that request."....."If all 12 of you agree that all 12 of you want all the tapes played over again, then you may have it." "...I think you should give it further deliberation, whether you need them all or whether you want particular ones..."(Vol. 11, pp. 9) Judge Mazzone then used the same analogy to chastizing the jury for wishing to *rehear* the instructions which "took about a half hour to give you." He again asked them to "maybe focus on a particular part of the instructions that bothers you most."(Vol. 11 , pp. 10) He then chastized the jury saying:

> "To hear the Judge's instructions means for me to repeat word for word what I told you yesterday, some of which I'm sure as the naming of Mr. Hosmer or filing out the jury slips and all perhaps you do not require." (Vol. 11, pp. 10)

In the pro se petition for rehearing and rehearing En Banc (pp. 9) the Petitioner pointed out to the First Circuit that they mis-read his argument and left parts of the total(Vol. 11) questions and answers out of their published opinion.

The appellant/Petitioner was entitled to have a *unanimous* vote of 12 jurors on guilt or innocence, PARKER V. GLADDEN, 385 U.S. 363, at 366 (1966 Per Curiam) (Harlan,J. Dissenting); the bizarre requirment made by Judge Mazzone, that the jury hold a *unanimous vote* as to which instructions they wished to "rehear" or tapes, in fact was a judicial "summary" 'cursory' denial of reinstruction, which, --- even if only one juror forgot what the judges instructions were --- , severely prejudiced the appellant/ Your Petitioner,BOLLENBACH V. UNITED STATES, 326 U.S. 607, 612-614(1946)

The respondants' totally avoided the main conflicting cases of UNITED STATES V. WEBSTER, 750 F2d 307, at 331 (1984) cet. denied. 105 S.Ct. 2340-2341(1985); GOVERNMENT OF VIRGIN ISLANDS V. BEDFORD, 671 F2d 758, at 762 (3rd Cir. 1982)Accord, following in line UNITED STATES V. ZARINTASH, 736 F2d 66, at 72 (3rd Cir. 1984) (Quoting Schneble V. Florida,405 U.S. 427, at 432 (1972)

Since the First Circuit found Barrasso's testimony was most likely bolstered (by the violation of the federal rules of evidence, during Agent's testimony), in a very similar case the Eigth Circuit has said "We cannot say that the error was harmless." UNITED STATES V. AZURE, 801 F2d 336, at 341 (Sept. 17,1986 8th Cir. 1986).

In addition the Eigth Circuit has decided a similar case using "no specific standard", UNITED STATES V. MARTIN,798 F2d 308, at 311(1986) The Seventh Circuit has ruled in square conflict by adopting a "harmless beyong a reasonable doubt standard" for violations of the federal rules of evidence. UNITED STATES V. BINDER, 794 F2d 1195, at 1202 (7th Cir. 1986)Rehearing & Rehearing En Banc denied. cf. UNITED STATES V. CERRO, 775 F2d 908, at 916 (7th Cir. 1985) cf UNITED STATES V. NORWOOD, 798 F2d 1094, at 1098 (7th Cir. 1986)

"It is always perilous to speculate on what the effect of evidence improperly admitted was on a jury, or what the effect of evidence improperly excluded would have been. See. Teitelbaumn Sutton-Barbere & Johnson, EVALUATING THE PREJUDICIAL EFFECT OF EVIDENCE; CAN JUDGES IDENTIFY THE IMPACT

OF IMPROPER EVIDENCE ON JURIES ?, Wis. L.Rev. 1147 (1983).

Considering what the effect of defense counsel's 277 objections (only 23 of which were sustained), during six-hundred pages of double and triple hearsay, and the impossibility of effectively crossexamining Barrasso, UNITED STATES V. KOHAN, 806 F2d 18, at 23 (2nd Cir 1986)(Quoting Gordon V. United States, 344 U.S. 414,423(1953), and the similar adverse effect in attempting to cross-examin Govt. Agents, MOONEY V. HOLOHAN, 294 U.S. 101(1936) does the fact the First Circuit ****stripped**** the error from the whole (Appendix pages 23-47) taking up twenty four pages of the decision, and the First Circuit using thirty more pages (Appendix pp. 1 through 23 and 48 through 54) to explain the twenty four pages they stripped from the 1100 page transcript, require reversal and remand of this case for reconsideration by the First Circuit ?

Your Petitioner presently has a conflict (3 seperate tests) within his own case, UNITED STATES V. MAZZA, 792 F2d 1210 (1986), and his case is in conflict with the 3rd, 5th and 7th Circuit cases set out herein.

The Government would banter semantically inane phrases to tell this Court that all three seperate tests are actually the same. Although the Petitioner would mildly oppose the Governments' logic, he would suggest that *the question is whether there is a reasonable possibility (this 600 pages of triple hearsay and 54 page First Circuit explanation) that the error complained of might have contributed to Petitioners conviction; particularly after the jury was improperly told he was out on bail for First-degree Murder, and some members of the jury forgot what the Judges instructions had been. FAHY V. STATE OF CONNECTICUT, 375 U.S. 85,86-87(1963);CHAPMAN V. CALIFORNIA, 386 U.S. 18,23(1967) (or a Modified New KOTTEAKOS standard)

RESPECTFULLY SUBMITTED,

February 10, 1987

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on the supplemental petition,

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VERIFICATION:

I Antonio Mazza hereby certify that each and every record fact and transcript or brief citation herein is true and correct, of my own personal knowledge.

Antonio Mazza
ANTONIO MAZZA

Signed and Sworn Before Me: [illegible]

My Commission Expires Dec 18 1988